STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2006
v	No. 260242 Wayne Circuit Court
DWIGHT JEROME SMITH, Defendant-Appellant.	LC No. 02-002099

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a felon, MCL 750.224f. Defendant was sentenced to mandatory life imprisonment for first-degree murder and to three to five years' imprisonment for possession of a firearm by a felon. He was also sentenced to two years' imprisonment for his felony-firearm conviction. For the reasons set forth in this opinion we affirm the convictions and sentence of defendant.

This appeal arises from a shooting which occurred on January 9, 2002. Detroit Police responded to a complaint of a shooting at a house in the city of Detroit, and upon their arrival, the responding officers heard someone inside stating, "help me I'm shot." Upon entering the dwelling, they found the victim, Demon Mitchell, lying face down behind the front door. Although the victim was having difficulty breathing, he was able to communicate to police that he had been shot in an upstairs bathroom. When the victim was asked who shot him, it sounded like he said "Dwayne Smith." The victim was alone in the house when found. No weapons were found at the scene, and there were no signs of forced entry. The victim later died of his wounds, and an autopsy revealed that he had been shot twice.

Dwayne Smith, defendant's brother, was brought to the police station for questioning, but it was determined that Dwayne had been at work at the time of the shooting. The police subsequently arrested defendant. After being informed of his constitutional rights, defendant made three statements while in custody. Defendant essentially admitted that he shot the victim, but asserted that the gun discharged during a struggle with the victim and that he shot the victim in self defense during an argument.

On appeal, defendant first argues that the evidence against him was insufficient to prove beyond a reasonable doubt that he was guilty of first-degree premeditated murder. In reviewing a claim that evidence was insufficient to support a conviction, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences therefrom may constitute sufficient evidence to find all the elements of an offense beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). To prove first-degree murder, the prosecution must show that defendant killed the victim, and that the killing was willful, deliberate, and premeditated. MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). "The interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a 'second look.'" *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Intent and premeditation may be inferred from the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and minimal circumstantial evidence is sufficient. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

From the record presented to us on appeal we find there was sufficient evidence presented at trial from which a rational jury could find premeditation and deliberation. The evidence showed that, although defendant and the victim were involved in an argument, the argument was interrupted when someone came to the victim's door. The victim put the gun down, essentially stopping the fight. Defendant had a sufficient opportunity for a "second look" during this time. Defendant did not leave the situation. Instead, defendant took possession of the gun. Moreover, after the victim finished his business at the door, defendant shot the victim. When the victim subsequently retreated upstairs, defendant followed him and shot him a second time. Under the circumstances, defendant had time for a "second look" before shooting, and the evidence provided sufficient support for a finding of premeditation and deliberation.

Defendant next argues that his statements to police were not voluntarily made and their admission at trial therefore denied his Constitutional rights. Whether a defendant's statements were knowing, intelligent, and voluntary is a question of law that is to be determined under the totality of the circumstances. *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). The prosecution must establish by a preponderance of the evidence that there was a valid waiver. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). Whether a waiver of *Miranda*[1] rights was voluntary is determined by examining police conduct. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

Defendant and police personnel gave completely contradictory accounts of the circumstances surrounding defendant's statements. Defendant testified that he was denied food and water, was promised leniency if he gave a statement, requested but was denied an attorney, and was told that his brother was going to be charged with murder. Police personnel testified that none of these things happened. The trial court ruled in favor of the police personnel's version of events. Deference is given to the trial court's assessment of the credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous.

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

People v Sexton (After Remand), 461 Mich 746, 752; 609 NW2d 822 (2000). Examining the facts presented on appeal, defendant has failed to make a persuasive argument that upon examination of the totality of the circumstances, the trial court's ruling amounted to clear error. The uncontested facts were that defendant was forty years old, had prior arrests and experience with the law, and had two years of a college education. While the questioning was prolonged and defendant made three statements, we are not left with a definite and firm conviction that the trial court erred in finding the police credible. Accordingly, in the absence of the requisite evidence for a contrary holding, we affirm the trial court's ruling.

Defendant next argues that he received ineffective assistance of counsel because counsel failed to raise a defense based on defendant's diagnosed post-traumatic stress disorder and failed to produce an expert witness to testify that defendant suffered from that disorder at the time the crime was committed.

Defendant did not move for an evidentiary hearing or a new trial based on ineffective assistance of counsel in the trial court. Therefore, the issue is not fully preserved and this Court's review is limited to mistake apparent on the record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). The denial of effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The facts and law are reviewed, respectively, for clear error and de novo. *Id*. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), which might have made a difference in the outcome of the trial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999).

The facts of the case as presented do not support a theory that defendant was affected by post-traumatic stress disorder at the time of the shooting. His statement was that he and the victim fought over a gun and the gun discharged. Defendant never even informed the police that he suffered from post-traumatic stress disorder during any of his three statements. There simply was no evidence on the record that defendant's conduct was affected by the disorder at the time of the crime, even though he may have been diagnosed with it. Therefore, there is no evidence that defendant was deprived of a substantial defense that would have made a difference in the outcome of the trial. *Dixon*, *supra*; *Ayres*, *supra*. Further, a counsel's failure to call witnesses is presumed to be trial strategy, and defendant has failed to overcome that presumption on the face of the record. *Dixon*, *supra*. Moreover, we note that in *People v Carpenter*, 464 Mich 223, 241; 627 NW2d 276 (2001), our Supreme Court unambiguously established that a defendant may not negate mens rea by introducing evidence of mental illness short of legal insanity. To the extent that defendant was attempting to use post-traumatic stress disorder as a mental illness defense to negate the element of premeditation, this is not permitted under *Carpenter*.

Defendant next argues that the trial court should have provided the jury with an instruction on involuntary manslaughter. This unpreserved error is reviewed for plain error

affecting defendant's substantial rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995). "[W]hen a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Accident was one of the defense theories in this case, and the trial court gave the jury an accident instruction. Based on the accident theory, we conclude that a rational view of the evidence supported an involuntary manslaughter instruction, and the instruction should have been given.

However, even when instructional error occurs, the burden is on the defendant to establish that the trial court's failure to give the requested instruction resulted in a miscarriage of justice. MCL 769.26. And, here, where the issue is unpreserved defendant must demonstrate plain error. *Gonzalez, supra*. Here, there was no miscarriage of justice or plain error because the jury was instructed on first-degree and second-degree murder, voluntary manslaughter, self-defense, and accident; yet the jury convicted defendant of first-degree murder. It clearly rejected the accident theory. "It is well established that, where a court fails to give lesser included offense instructions, the error is harmless if the jury rejects an option to convict of another reduced offense." *People v Cornell*, 466 Mich 335, 373; 646 NW2d 127 (2002). The error of failing to give an involuntary manslaughter instruction cannot be shown to have affected defendant's substantial rights. *Gonzalez, supra*; *Cornell, supra*.

Defendant also argues that the prosecution failed to present sufficient evidence that he was a felon in possession of a firearm. A claim that evidence was insufficient to support a conviction raises an issue of law that must be reviewed de novo by this Court. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). It is the prosecution's burden to prove every element of an offense. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995).

The felon in possession statute provides that "[a] person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive or distribute a firearm in this state until" five years have passed since the person pays all fines, served all terms of imprisonment, and successfully completed all conditions of probation or parole. MCL 750.224f(2)(a). The person must also have restored his right to possess or use firearms pursuant to MCL 28.424. MCL 750.224f(2)(b).

Defense counsel stipulated at trial that defendant had not restored his right to possess or use firearms under MCL 28.424. That stipulation was presented to the jury. The element of the charge to which counsel stipulated cannot be attacked on the ground that the prosecutor failed to present sufficient evidence. *People v Kremko*, 52 Mich App 565, 575; 218 NW2d 112 (1974). Therefore, defendant's argument as to the insufficiency of the evidence on that element is without merit.

Defendant also stipulated that he was convicted of an "unnamed" felony. Although the stipulation was not to a "specified felony" as delineated in the statute, it was defense counsel who requested that the felony remain unnamed before the jury. Defense counsel argued that if the prior felony, armed robbery, was named before the jury, it would result in prejudice to

defendant. Therefore, counsel arguably "stipulated" to the fact that the felony was a specified one because he admitted that defendant was convicted of a felony that met the definition of a specified felony. A defendant is not allowed to assign error to something his counsel deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). In any event, we note that defendant's arguments are without merit because armed robbery is one of the specified felonies in the statute.[2]

Defendant also argues that the prosecution failed to prove that defendant carried or possessed a firearm at the time of the incident. In this case the prosecution relied on circumstantial evidence to prove that the defendant possessed a firearm at the time of the incident. Circumstantial evidence and reasonable inferences therefrom may constitute sufficient evidence to find all the elements of an offense beyond a reasonable doubt. *Nowack*, *supra*. The standard for reviewing a claim of insufficient evidence is deferential and this Court must make all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Id.*; *McFall*, *supra*. Further, possession may be actual or constructive and may also be proved by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). A defendant has constructive possession of a firearm if its location is known, and the firearm is reasonably accessible, to him or her. *Id.* at 438.

The evidence presented demonstrated that defendant took the victim's gun when the victim set it down. Later, while the victim and defendant struggled, the gun discharged. Defendant subsequently followed the victim upstairs, where the victim was again shot. It can reasonably be inferred that defendant took the gun with him upstairs. Thus, the prosecution presented sufficient evidence that defendant possessed a gun and therefore we find sufficient evidence to support the felon in possession conviction.

Defendant next argues that his counsel was ineffective for "conceding her client's guilt" by stipulating to two of the three elements of the offense. A defense attorney may not admit their client's guilt without first obtaining the client's consent. *People v Fisher*, 119 Mich App 445, 448; 326 NW2d 537 (1982). Counsel may believe it tactically wise to stipulate to a particular element of a charge or to issues of proof, but they may not stipulate to facts which amount to the "functional equivalent" of a guilty plea. *Id.* at 447. Defense counsel's stipulations here were tactical and meant to protect defendant from prejudice. Further, the elements stipulated to were facts that could easily have been proven by official documents. Because defense counsel left the prosecution to its proofs on the element of possession, her stipulation was not a "functional equivalent" of a guilty plea, and therefore, we cannot find that defense counsel was not ineffective.

[2] A specified felony is one that has an element of "the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." MCL 750.224f(6)(i).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello